SHAYNE COREY CAHILL A

v.

KAKA SINGH DHALIWAL

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
RAUS SHARIF JCA
WAN ADNAN MUHAMAD JCA
[CIVIL APPEAL NO: W-02-119-2005]
31 DECEMBER 2007 C

UNINCORPORATED ASSOCIATIONS: *Societies - Malaysian Racing Association - Jurisdiction - Decision by Racing Stewards to review jockey's appeal against sentence - Whether review within r. 18(2)(c) Malaysian Racing Association Rules - Whether jurisdiction ousted with the filing of jockey's action in court against sentence* D

The plaintiff, a professional jockey from Australia, was found guilty on two separate charges under r. 144(2) of the Malaysian Racing Association ('MRA') Rules. He was imposed the minimum sentence E of disqualification of one-year from racing in respect of the earlier charge and a three-year disqualification from racing and a RM50,000 fine in respect of the subsequent charge. Both sentences were to run consecutively. He appealed to the Racing Stewards ('RS') against the sentences imposed but that was F dismissed. He then filed an originating summons ('OS') to the High Court for declarations, *inter alia,* that the decisions of the RS were invalid and wrong in law. Five days after the filing of the OS, the RS issued a letter to the plaintiff admitting that it had made a mistake on the sentence imposed in respect of the G subsequent charge. The RS wished to reconvene to review its decision on the sentence and requested the plaintiff to attend the reconvened hearing and make further submissions. The plaintiff did not attend the hearing. Before the High Court, the plaintiff confined his argument on the three-year sentence that was H imposed. The learned judge accepted the defendant's admission on behalf of the RS that it had committed an error in the sentencing on appeal. However, he held that the RS had the power to correct the error by virtue of r. 18(2)(c) of the MRA Rules. The plaintiff's OS was dismissed. On appeal to this court, the plaintiff I

confined his submission to one single issue, *ie*, whether the RS had the jurisdiction to review its decision after the filing of the plaintiff's OS. The defendant contended that this issue raised by the plaintiff was never raised in the court below and was only raised for the first time herein. Therefore, it should not be entertained. Alternatively, the RS was not *functus officio* and had the jurisdiction to review its decision.

Held (dismissing the plaintiff's appeal)
Per Raus Sharif JCA delivering the judgment of the court:

(1) The general rule is that an issue not raised in the court below cannot be raised on appeal. However, as an appeal is conducted by way of a re-hearing, an appellate court retains the discretion as to whether to entertain a point raised for the first time on appeal. The categories of cases in which an appellate court will admit a new point not raised in the court below are not closed. This was a case where the court should exercise its discretion in favour of hearing the new point raised by the plaintiff. This was because the new point raised by the plaintiff was solely on the point of law based on undisputed facts. Hence, this court should not be precluded from hearing it. (paras 18 & 19)

(2) The RS was not *functus officio* and its jurisdiction was not ousted with the filing of the OS. This was because the jurisdiction and function of the RS were distinctly different from the jurisdiction and function of the courts. The function and jurisdiction of the courts in these types of cases were supervisory in nature. The courts were only concerned with the correctness of the decision-making process, *ie*, the procedure involved in the sentencing of the plaintiff and not with the merits of the decision itself, *ie*, the actual sentencing. Simply put, the courts would not decide on what was the appropriate sentence for the plaintiff, which function was properly vested within the jurisdiction of the RS. (para 20)

(3) The plaintiff's main complaint before the High Court was only on the subsequent sentence imposed. The RS admitted its mistake and called the plaintiff to attend a reconvened hearing as allowed by the MRA Rules. The RS even accommodated the request by the plaintiff for an adjournment but the plaintiff chose not to turn up at the scheduled hearing. Therefore, he

could not now complain and use this issue to knock out the entire disciplinary proceedings where his guilt had been proven and not challenged before the High Court. At best the case should be remitted to the RS to hear further submission on sentence and to impose the appropriate sentence on the plaintiff. However, that was exactly what the RS sought to do four years ago but was refused by the plaintiff. Hence, there was no purpose of sending the case back to the RS to hear further submissions by the plaintiff on the sentence. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif, seorang joki profesional dari Australia, didapati bersalah atas dua pertuduhan di bawah per. 144(2) Peraturan-Peraturan Persatuan Lumba Kuda Malaysia ('MRA'). Berhubung pertuduhan pertama, beliau telah dilucutkan kelayakan berlumba selama setahun, sementara untuk tuduhan berikutnya beliau dilucutkan kelayakan berlumba selama tiga tahun dan didenda RM50,000. Kedua-dua hukuman diperintahkan berjalan secara berasingan. Beliau telah merayu kepada Steward Perlumbaan ('RS') tetapi rayuannya telah ditolak. Beliau kemudian memfailkan saman pemula ('OS') di Mahkamah Tinggi antara lain bagi memohon perisytiharan bahawa keputusan RS adalah tak sah dan batal di sisi undang-undang. Lima hari selepas memfailkan OS, RS telah mengeluarkan satu surat kepada plaintif mengakui bahawa ia telah melakukan kesilapan dalam menjatuhkan hukuman untuk pertuduhan yang terkemudian. RS berhasrat untuk menyambung pendengaran dan mengkaji semula keputusannya berhubung hukuman dan meminta plaintif supaya hadir di pendengaran tersebut dan mengemukakan hujah-hujah lanjutan. Plaintif bagaimanapun tidak menghadirkan diri. Di hadapan Mahkamah Tinggi, plaintif menghadkan hujahnya kepada hukuman tiga tahun yang dikenakan. Yang arif hakim menerima pengakuan defendan bagi pihak RS bahawa ia telah melakukan kesilapan dalam menjatuhkan hukuman semasa rayuan. Beliau bagaimanapun memutuskan bahawa RS mempunyai kuasa untuk membetulkan kesilapan berdasarkan per. 18(2)(c) Peraturan MRA. Berikutnya, OS plaintif ditolak. Di rayuan di mahkamah ini, plaintif menghadkan rayuannya kepada satu isu tunggal sahaja, iaitu, sama ada RS berbidangkuasa untuk mengkaji semula keputusannya selepas plaintif memfailkan OSnya. Defendan berhujah bahawa isu yang dibangkitkan plaintif ini tidak pernah dibangkitkan di mahkamah di bawah dan hanya dibangkitkan buat

pertama kali pada rayuan di sini, dan kerana itu, ia tidak harus dilayani. Secara alternatifnya, dihujahkan bahawa RS tidak *functus officio* dan berbidangkuasa untuk mengkaji semula keputusannya.

Diputuskan (menolak rayuan plaintif)

Oleh Raus Sharif HMR menyampaikan penghakiman mahkamah:

(1) Kaedah amnya adalah bahawa suatu isu yang tidak dibangkitkan di mahkamah di bawah tidak boleh dibangkitkan di peringkat rayuan. Bagaimanapun, disebabkan rayuan dikendalikan sebagai pendengaran semula, sebuah mahkamah rayuan masih mempunyai budibicara sama ada untuk melayani soal yang dibangkitkan buat pertama kali semasa rayuan. Kategori kes di mana mahkamah rayuan akan menerima persoalan baru yang tidak dibangkitkan di mahkamah di bawah tidak pernah ditutup. Ini adalah satu kes di mana mahkamah harus melaksanakan budibicaranya untuk mendengar persoalan baru tersebut yang dibangkitkan oleh plaintif. Ini kerana persoalan baru yang dibangkitkan khusus menyentuhi persoalan undang-undang yang baru berdasarkan kepada fakta-fakta tidak dipertikai. Dengan itu mahkamah ini tidak harus dihalang dari mendengarnya.

(2) RS tidak *functus officio* dan bidangkuasanya tidak tersingkir disebabkan pemfailan OS. Ini kerana bidangkuasa dan fungsi RS adalah berbeza berbanding bidangkuasa dan fungsi mahkamah. Fungsi dan bidangkuasa mahkamah dalam kes-kes seperti ini adalah berbentuk pengawasan. Mahkamah hanya mementingkan kebetulan proses membuat keputusan, iaitu, prosedur yang digunakan dalam menghukum plaintif dan bukannya merit keputusan tersebut, iaitu penghukumannya. Dengan kata lain, mahkamah tidak akan memutuskan berkaitan apakah hukuman yang sesuai untuk plaintif, kerana fungsi ini sewajarnya adalah tertakluk kepada bidangkuasa RS.

(3) Rungutan utama plaintif di Mahkamah Tinggi hanyalah berkaitan hukuman terkemudian yang dijatuhkan. RS mengakui kesilapannya dan telah memanggil plaintif untuk menghadiri sambungan pendengaran seperti yang dibenarkan oleh Peraturan MRA. RS malah telah memenuhi permintaan plaintif untuk suatu penangguhan tetapi plaintif sebaliknya memilih untuk tidak menghadirkan diri di pendengaran. Oleh itu, plaintif

tidak boleh sekarang merungut dan menggunakan isu ini untuk memadamkan keseluruhan prosiding disiplin di mana kebersalahannya telah dibuktikan dan tidak dicabar di Mahkamah Tinggi. Di peringkat yang paling tinggi, kes ini hanya boleh dikembalikan kepada RS untuk mendengar penghujahan lanjut berhubung hukuman dan menjatuhkan hukuman wajar ke atas plaintif. Bagaimanapun, itulah yang cuba dilakukan oleh RS empat tahun yang lalu tetapi ditolak oleh plaintif. Oleh itu, tiada gunanya menghantar kembali kes ke RS untuk mendengar penghujahan lanjut plaintif mengenai hukuman.

Case(s) referred to:
Doleman & Sons v. Ossett Corporation [1912] 3 KB 257 ***(refd)***
Gulwant Singh v. Abdul Khalik [1965] 2 MLJ 55 ***(refd)***
Huang Han Chao v. Leong Fook Meng & Anor [1991] 3 CLJ 2992; [1991] 4 CLJ (Rep) 525 CA ***(refd)***
Innaya v. Limbard [1963] 1 MLJ 30 ***(refd)***
Lim Geah Liang v. East West UMI Insurance [1997] 4 CLJ 405 FC ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 2 CLJ 713 CA ***(refd)***
Re Baker and Wessenger [1981] 125 DLR (3d) 167 ***(dist)***
V Letchumanan v. Central Malaysia Finance Bhd [1980] 2 MLJ 96 ***(refd)***
Wah Bee Construction Engineering v. Pembenaan Fungsi Baik Sdn Bhd [1996] 3 CLJ 858 CA ***(dist)***

Legislation referred to:
Malaysian Racing Association Rules, rr. 18(2)(c), 144(2), (5),

For the plaintiff/appellant - M David Morais; M/s M David Morais
For the defendant/respondent - G Rajasingam (Jason Lai with him); M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S1-24-1148-2003]

Reported by Usha Thiagarajah

JUDGMENT

Raus Sharif JCA:

[1] This is an appeal by the plaintiff against the decision of the learned High Court judge, given on 6 January 2005 in respect of the plaintiff's originating summons dated 25 June 2003. The learned High Court judge had dismissed the plaintiff's application for the declaratory orders sought in the originating summons.

[2] On 26 September 2007 we heard and dismissed the plaintiff's appeal with costs.

[3] The plaintiff is a professional jockey from Australia. Sometime in March 2003, he applied and received the approval from Selangor Turf Club to be a visiting jockey. The Selangor Turf Club is a member of the Malaysian Racing Association ("MRA"). MRA is a body that regulates the profession and sport of horse racing in Malaysia and Singapore. The other members of MRA are Penang Turf Club, Perak Turf Club and Singapore Turf Club.

[4] On the 30 March 2003, the plaintiff rode a horse named "KIM MUSIC". Subsequent to the race, on 4 April 2003, he was charged before the Stipendiary Stewards under r. 144(2) of the MRA Racing Rules. The charge was for not taking all reasonable and permissible measures throughout the race to ensure that "KIM MUSIC" was given full opportunity of winning or obtaining the best possible placing in that race. The charge is punishable under r. 144(5) of the MRA Racing Rules.

[5] The plaintiff was found guilty of the charge. He was imposed the minimum sentence of disqualification of one year from racing. Being aggrieved, the plaintiff appealed to the Racing Stewards as allowed under the MRA Racing Rules.

[6] On 5 April 2003, the plaintiff was granted a stay of the sentence pending hearing of his appeal before Racing Stewards. During the stay of the sentence, the plaintiff participated in another race. This was the 4th race held on 6 April 2003 at the Selangor Turf Club. At this race, he rode a horse named "JAKISHA". Subsequent to the race, on 9 April 2003, he was again charged before the Stipendiary Stewards. The charged was also under r. 144(2) and punishable under r. 144(5) of the MRA Racing Rules. But this time, the charge was for not taking all reasonable and permissible measures throughout the race to ensure that "JAKISHA" was given a full opportunity of winning or of obtaining the best possible placing in that race.

[7] The plaintiff was found guilty of the said charge. He was sentenced to three years disqualification from racing. The disqualification was to run consecutively after the disqualification imposed in respect of "KIM MUSIC". He was also fined RM50,000. Again, being aggrieved, the plaintiff appealed to the Racing Stewards against the said decision.

[8] Both appeals were heard by the Racing Stewards on 20 June 2003, and both were dismissed on the same day. A

[9] On 25 June 2003, the plaintiff filed this originating summons. He sought the following orders:

B

(i) A declaration that the Racing Stewards' decision of 20 June 2003, dismissing the plaintiff's appeal against the decision of the Stipendiary Stewards on 4 April 2003 on the plaintiff's 1 year disqualification for breaching r. 144(2) of the Malayan Racing Association's ("MRA") Rules of Racing as the jockey of "KIM MUSIC" in Race 4, 2nd Day, Sunday 20 March 2003 in the March/April 2003 Selangor Meet, and in further deciding that the sentence shall commence from the date of breach, is invalid and unenforceable because the Racing Stewards erred in taking the view that it is unnecessary for the Stipendiary Stewards to prove all the ingredients of a charge, and that as long as one ingredient of the charge is proven it is sufficient, as this is wrong in law.

C

D

(ii) A declaration that the Racing Stewards' decision of 20 June 2003, dismissing the plaintiff's appeal against the decision of the Stipendiary Stewards on 9 April 2003 on a 3 year disqualification, to commence after the expiry of the 1 year disqualification for "KIM MUSIC", that the fine of RM50,000 in relation to the plaintiff's breach of r. 144(2) MRA Rules of Racing as the jockey of "JAKISHA" in Race 4, 4th Day, Sunday 6 April 2003, of the Sultan of Selangor Gold Trophy Meet 2003 be confirmed, and that the deposit for the appeal be forfeited, is invalid and unenforceable because:

E

F

(a) after the Racing Stewards dismissed the plaintiff's appeal, the Racing Stewards failed to give the plaintiff's solicitors an opportunity to mitigate the sentence even though in the appeal petition, the plaintiff had appealed that the sentence meted out by the Stipendiary Stewards is harsh and excessive, and this is a breach of natural justice;

G

H

(b) the Racing Stewards erred in taking the view that it is unnecessary for the Stipendiary Stewards to prove all the ingredients in a charge, and that as long as one ingredient is proven, it is sufficient, and this is wrong in law; and

I

A (c) the Racing Stewards erred in law in deciding that the charge is not wrongful in law.

(iii) An order that the deposit be returned to the plaintiff.

B (iv) An order for damages to be assessed and paid by the defendant to the plaintiff.

[10] On 30 June 2006, five days after filing the originating summons, the Racing Stewards issued a letter to the plaintiff's solicitors, admitting that they had made a mistake on the sentence C imposed in the appeal in respect of "JAKISHA". The letter went further to inform the plaintiff that the Racing Stewards, who heard the appeal, wished to reconvene to review their decision on sentence and requested the plaintiff to attend this reconvened hearing and to make further submission on the sentence imposed. D For ease of reference, the letter is hereby reproduced.

> Appeal by Jockey S. Cahill against three (3) years disqualification and fine of RM50,000 in connection with the running and handling of "JAKISHA" which finished 2nd in Race 4, 4th day, Sunday, 6th April 2003, Selangor March/April (Piala Emas Sultan E Selangor) Meeting 2003
>
> ---
>
> The Race Meeting Stewards who presided at the above appeal have now resolved to re-convene to hear submissions from F Mr. Cahill on the appropriate sentence arising from the dismissal of the appeal lodged by him.
>
> The Race Meeting Stewards now realise that the appropriate sentence following their decision to disallow the appeal is not a mandatory three-year term as originally envisaged by them but a G discretionary, as is evident from Rule 144(5). This is to be determined based on the facts leading to the particular conviction.
>
> Accordingly, acting under the powers conferred upon them by Rule 18(2)(c), the Race Meeting Stewards propose to review their own previous decision to disqualify Mr. Cahill for a period of H three years.
>
> This letter accordingly serves to inform you that a further hearing will be held on Friday, 4 July 2003 at 4.00 pm at the Enquiry Room, Selangor Turf Club, where Mr. Cahill can be present in person and/or with his counsel, to make submissions on the I appropriate sentence to be imposed upon him pursuant to Rule 144(5) arising from the dismissal of his appeal against conviction in the above matter.

If the date of hearing is not suitable to you, kindly notify us of a suitable date.

[11] By a letter dated 9 July 2003, the plaintiff's solicitors requested for the hearing date be fixed in the month of August. The request was accommodated by the Racing Stewards. In a letter dated 31 July 2003, the Racing Stewards informed the plaintiff's solicitors that 13 August 2003 was the new hearing date. However, neither the plaintiff nor his solicitors attended the hearing.

[12] In his application before the High Court, the plaintiff had cast his case in two parts:

(i) that the Racing Stewards had 'erred in law in the case of "KIM MUSIC" and "JAKISHA" when they did not require every ingredient in the charge to be proven'.

(ii) that in the "JAKISHA" proceedings the Racing Stewards had failed to allow the plaintiff the opportunity to mitigate his sentence.

[13] When the application was heard, the plaintiff's counsel informed the learned High Court judge that the plaintiff would not be continuing with his application in respect of the "KIM MUSIC" proceedings. The plaintiff's counsel further informed the learned High Court judge that in respect of "JAKISHA" proceedings, the plaintiff would not be pursuing the contention that every ingredient in the charge was required to be proven.

[14] Thus, before the High Court, the argument was confined to the findings of Racing Stewards on the sentence imposed in the appeal for "JAKISHA". In his judgment the learned High Court Judge accepted the defendant's admission that it had committed an error in the sentencing at the appeal. He held, however that the Racing Stewards have the power to correct the error by virtue of r. 18(2)(c) of the MRA Racing Rules. The plaintiff had no basis to complaint.

[15] However, before us, the plaintiff had confined his submission to one single issue:

A whether the Race Meeting Stewards have the jurisdiction to review their decision on the plaintiff's appeal to correct an admitted error, after the appellant had filed his Originating Summons in the High Court.

B **[16]** It is the submission of the plaintiff that after the filing of the originating summons on 25 June 2003, the Racing Stewards were *functus officio* and had no jurisdiction to review their decision. The matter was firmly within the jurisdiction of the court and it was only the court which had the jurisdiction to review the findings of the Racing Stewards. The Racing Stewards' jurisdiction has been C ousted by the filing of the originating summons. In support, the plaintiff's counsel cited case authorities, *Wah Bee Construction Engineering v. Pembenaan Fungsi Baik Sdn Bhd* [1996] 3 CLJ 858, *Doleman & Sons v. Ossett Corporation* [1912] 3 KB 257 and *Re Baker and Wessenger* [1981] 125 DLR (3d) 167.

D **[17]** The defendant contended that the issue raised by the plaintiff was never raised in the court below and was only raised for the first time in the appeal herein. Thus, it should not be entertained. Alternatively, it is the contention of the defendant that E the Racing Stewards were not *functus officio* and had the jurisdiction to review their decision. The authorities cited by plaintiff's counsel, are distinguishable.

Findings

F (i) *Raising a point not raised in the court below*

[18] The general rule is that an issue which was not raised in the court below cannot be raised on appeal (*Innaya v. Limbard* [1963] 1 MLJ 30; *V Letchumanan v. Central Malaysia Finance Bhd* [1980] G 2 MLJ 96). However, as an appeal is conducted by way of a rehearing, an appellate court retains the discretion as whether to entertain a point raised for the first time on appeal (*Gulwant Singh v. Abdul Khalik* [1965] 2 MLJ 55; *Huang Han Chao v. Leong Fook Meng & Anor* [1991] 3 CLJ 2992; [1991] 4 CLJ (Rep) 525 CA; H *Lim Geah Liang v. East West UMI Insurance* [1997] 4 CLJ 405 FC). In *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 2 CLJ 713 CA Gopal Sri Ram JCA held that the categories of cases in which an appellate court will admit a new point not raised in the court below are not closed.

I

[19] It is our respectful view that this is a case where we should exercise our discretion, in favour of hearing the new point raised by the plaintiff. This is because the new point raised by the plaintiff is solely on the point of law, based on undisputed facts. Hence, this court should not be precluded from hearing it.

(ii) Were the Racing Stewards *functus officio* and had no jurisdiction to review their own decision the moment the originating summons was filed.

[20] The plaintiff's position is that the moment the originating summons was filed, the Racing Stewards were *functus officio* and had no jurisdiction to review their decision. With respect, we disagree. We are of the view that the Racing Stewards were not *functus officio* and their jurisdiction has not been ousted by the filing of the originating summons. This is because the jurisdiction and function of the Racing Stewards are distinctly different from the jurisdiction and function of the courts. The function and jurisdiction of the courts in these type of cases is supervisory in nature. The courts are only concerned with the correctness of the decision making process, ie, the procedure involved in the sentencing of the plaintiff, and not with the merits of the decision itself ie, the actual sentencing. Simply put, the courts will not decide on what is the appropriate sentence for the plaintiff, which function is properly vested within the jurisdiction of the Racing Stewards.

[21] It is in this respect that the cases of *Wah Bee Construction Engineering, Doleman & Sons*, and *Re Baker* relied by the defendant can be distinguished. Whilst it is not disputed that the courts in those cases held that the arbitral tribunals were *functus officio* once the matters were properly before the courts, one must understand the rationale behind those decisions in that there cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. Those cases concern the jurisdiction of the court as against the jurisdiction of the arbitral tribunal pursuant to an arbitration agreement. In such cases, once both parties have elected to have their disputes adjudicated in court, the court is properly seized with the exact jurisdiction as the arbitral tribunal in deciding the rights of the parties. The courts therein do not merely exercise a supervisory jurisdiction.

[22] It is for those reasons that the courts in *Wah Bee Construction, Doleman & Sons* and *Re Baker* decided that the arbitral tribunals were *functus officio*, as one cannot have two tribunals deciding the same overlapping issues. In the present case there is no question of whether the High Court is deciding on the same issues as the Racing Stewards. Hence, it is our respectful view that the Racing Stewards were not *functus officio* notwithstanding the filing of the originating summons.

[23] In any event, as stated earlier, the function of the courts in these types of cases is supervisory in nature. In this case, the main complaint of the plaintiff as to "JAKISHA" proceeding before the High Court was only on sentence. The Racing Stewards admitted their mistake and called the plaintiff to attend a reconvened hearing as allowed by the MRA Rules, for the plaintiff to make further submission on the sentence. The Racing Stewards even accommodated the request by the plaintiff for an adjournment. But the plaintiff chose not to turn up at the scheduled hearing. Thus, he could not now complain and use this issue to knock out the entire disciplinary proceeding where his guilt has been proven and not challenged before the High Court. At best, we can remit the case to the Racing Stewards to hear further submission on sentence and to impose the appropriate sentence on the plaintiff. But that was exactly what the Racing Stewards sought to do four years ago but was refused by the plaintiff. Hence, we see no purpose of sending the case back to the Racing Stewards to hear further submission by the plaintiff on the sentence.

[24] For the above reasons, we unanimously dismissed the plaintiff's appeal with costs. Deposit to the defendant towards account of taxed costs.